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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

ANN OTSUKA, an individual; JANIS KEEFE, an individual; CORINNE PHIPPS, an individual; and JUSTIN KISER, an individual; individually and on behalf of all others similarly situated, and RENEE DAVIS, an individual; individually and on behalf of all others similarly situated,	) Case No.: C-07-02780-SI
)
Plaintiffs,	) PLAINTIFF AND CROSS-DEFENDANT
vs.	) JUSTIN KISER'S MEMORANDUM IN
	) REPLY TO COUNTERCLAIMANT'S
	) OPPOSITION TO MOTION TO DISMISS
	) THE COUNTERCLAIMS OF FASHIONS
	) OUTLET OF AMERICA, INC.
)
	) FEDERAL RULE OF CIVIL PROCEDURE
POLO RALPH LAUREN CORPORATION; a Delaware Corporation; POLO RETAIL, LLC., a Delaware Corporation; POLO RALPH LAUREN CORPORATION, a Delaware Corporation, doing business in California as POLO RETAIL CORP; and FASHIONS OUTLET OF AMERICA, INC., a Delaware Corporation	) 9(b) AND 12(b)(6)
)
Defendants.	) JUDGE: Hon. Susan Illston
	) LOCATION: Courtroom 10, 19 th Floor
) 450 Golden Gate Avenue
) San Francisco, California 94102
) DATE: November 9, 2007
) TIME: 9:00 a.m.
)
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)
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I.

Counterclaimant Mischaracterizes The Law Governing Fiduciary Duties Between Employees And Employers In California

Counterclaimant attempts to salvage its fatally defective “breach of fiduciary duty” counterclaim against Justin Kiser by re-characterizing it now as a claim for *breach of loyalty*, a duty Counterclaimant argues is applicable to all employees in California, including hourly sales clerks like Mr. Kiser.

Not only is the claim defective as a matter of law, Counterclaimant grossly mischaracterizes or misunderstands the nature of a fiduciary relationship in the employment context. To begin with, a fiduciary relationship is either established by law under special circumstances, or created by contract. Gabb Business Services v. Lindsay and Newsom Claim Services, Inc. 83 Cal.App.4th 409 (2000). Here, Counterclaimant does not allege such a relationship was created by contract. Instead, Counterclaimant argues California law imposes a *fiduciary-like* duty upon every single employee in California, from a sales clerk like Mr. Kiser to a company’s chief financial officer, and, further, that a breach of that *fiduciary-like* duty supports a distinct cause of action. That is not now and has never been the law of this State.

Nevertheless, Counterclaimant professes to find support for this aggrandizement of California law in several reported decisions it contends are controlling, persuasive or even “directly on point.” (Opposition, 6:22-28, for example.) Counterclaimant’s interpretation or characterization of those cases, however, is misleading.

In James v. Childtime Childcare, Inc. U.S. Dist. LEXIS 43753 (D.Levi) (E.D. 2007), the **director of a childcare center** sued her employer for wrongful termination. Her employer counterclaimed, alleging, *inter alia*, a cause of action for breach of fiduciary duty. The director argued that as an employee she did not owe a fiduciary duty to her employer. Childtime countered, “**James was the director of the center, not a mere employee**, and therefore subject to fiduciary duties.” (Emphasis added.) Based on the special relationship James had with the

1 employer, as the company's director, the Court denied James' motion to dismiss the breach of
 2 fiduciary duty claim, on the ground, "at least one California court has found fiduciary
 3 obligations from a '**managerial**' employee to an employer." (Emphasis added.) In that
 4 California decision, Diodes, Inc. v. Franzen, 260 Cal.App.2d 244, 249 (1968), the Court found a
 5 fiduciary duty running from "**directors, officers and managing employees**" to their corporate
 6 employer. *Id.* at 249, emphasis added.

7 Counterclaimant also represents that Stokes v. Dole Nut Company (1995) 41 Cal.App.4th
 8 285 imposes a fiduciary duty on all employees in California. Like every other case where a
 9 fiduciary duty has been imposed upon an employee under California law, however, the
 10 employees in Stokes were **company managers who held positions of authority**. Finding the
 11 managers were in a special relationship with their employer lead the Court to find the existence
 12 of a fiduciary duty. (See, also, Fowler v. Varian Associates, Inc. (1987) 196 Cal.App.3d 34,
 13 where the Court found a fiduciary duty running from the **marketing director** to the
 14 corporation.)

15 Counterclaimant also asserts that Thorman v. American Seafoods, Co., 421 F.3d 1090
 16 (9th Cir. 2005) establishes that a sales clerk like Mr. Kiser owes a fiduciary duty to his
 17 employer. Counterclaimant's reference to this decision is peculiar. Thorman addressed
 18 whether vessel owners (employers) owe their crew members (employees) a fiduciary duty to
 19 "explain their precise compensation methodology." The case is inapplicable to the claims at
 20 issue here.

21 Finally, because Counterclaimant cannot find any decision under California law to
 22 support its breach of fiduciary duty claim against a mere sales associate, it turns to Eckard
 23 Brandes, Inc. v. Riley, a Ninth Circuit case decided under the law of **Hawaii**, for the proposition
 24 that all employees owe their employer a fiduciary duty. 338 F.3d 1082 (9th Cir. 2003). While
 25 Hawaii *may* impose such a duty, California does not. (The Ninth Circuit could not find direct
 26 Hawaiian authority permitting an employer to bring a cause of action for breach of fiduciary

1 duty against its employee, but, based on a 1946 appellate case, concluded the Hawaii Supreme
2 Court would permit such a claim if it were ever called upon to decide the issue.)

3 What all of these cases have in common is obvious. They all involved claims against
4 **management-level employees** who, because of their special positions of authority, were found
5 to be subject to special duties to their employers. Even then, the appellate courts struggled to
6 identify the nature and scope of those duties in the context of claims for damages arising out of
7 the alleged breaches.

8 Counterclaimant has not cited any appellate authority that remotely suggests all
9 employees in California are subject to a fiduciary duty, or even a “duty of loyalty,” that can
10 independently support a cause of action against them by their employers. If that were the law,
11 the legal ramifications would be immense because the finding of a fiduciary relationship
12 running from an employee to an employer establishes broad, special duties. For example, a
13 Starbucks’ barista who planned to open an independent coffee shop would be required to
14 disclose her plans to Starbucks or face the real threat of a lawsuit for breaching a duty to her
15 employer. Stokes v. Dole Nut Company (1995) 41 Cal.App.4th 285. As far as Mr. Kiser can
16 determine, no California court, or Federal court applying California law, has ever found the
17 existence of a *fiduciary-like* duty between a low-level, non-managerial employee and his
18 employer.

19 Finally, Counterclaimant argues California Labor Code § 2860 *somehow* independently
20 establishes a fiduciary duty running from all employees in California to their employers. Labor
21 Code § 2860 does nothing of the sort. It reads:

22 Everything which an employee acquires by virtue of his employment, except
23 the compensation which is due to him from his employer, belongs to the
24 employer, whether acquired lawfully or unlawfully, or during or after the
25 expiration of the term of his employment.

Thus, Counterclaimant has not and cannot assert a viable claim for breach of fiduciary duty, or “breach of loyalty,” as they now characterize the claim, against Mr. Kiser. It should be dismissed with prejudice.

II.

Counterclaimant Also Mischaracterizes The Law Governing The Pleading Requirements For A “Conspiracy To Commit Fraud” Claim.

Counterclaimant’s statement that Mr. Kiser concedes the adequacy of its “conspiracy to commit fraud” is wishful thinking. In fact, Mr. Kiser’s instant challenge to the claim is based on Counterclaimant’s failure to adequately plead the nature of the conduct it alleges constituted the wrongful acts, as is required under Federal Rule of Civil Procedure 9(b).

To adequately plead a cause of action for conspiracy, the pleading party must adequately plead the conduct it alleges is wrongful. Where fraud is alleged to constitute the civil wrong resulting from the alleged conspiracy, Rule 9(b) requires the “circumstances constituting fraud or mistake [to] be stated with particularity.” Counterclaimant has failed to do so.

Counterclaimant again misconstrues Federal and California law on this issue. For example, Counterclaimant reads Wasco Products, Inc. v. Southwall Technologies, Inc. 435 F.3d 989, for the proposition that a conspiracy to commit fraud claim is sufficient if the counterclaimant pleads the conspiratorial acts and generally avers to fraud. (Opposition at 9:1-4.) This is not what Wasco Products holds. It expressly held that to withstand a challenge to the claim, a allegations must meet the heightened pleading requirements of Rule 9(b), as Mr. Kiser correctly explains in his moving papers.

We begin our analysis by observing that the object of the alleged conspiracy is fraudulent: to misrepresent the properties of the Heat Mirror IGUs. Rule 9(b) of the Federal Rules of Civil Procedure requires plaintiffs to plead fraud with particularity.

435 F.3d 989 (9th Cir. 2006). This is a very clear statement of the law.

1 Thus, the test is not whether Counterclaimant has adequately pled conspiracy or fraud; it
 2 is whether Counterclaimant has adequately pled conspiracy and fraud pursuant to Rule 9(b). In
 3 this case, Counterclaimant has not done so.

4 Counterclaimant also misreads Weinbaum v. Goldfarb, Whitman & Cohen (1996) 46
 5 Cal.App.4th 1310, to stand for the proposition that a claim for conspiracy to commit fraud would
 6 be sufficient if the pleader described the conduct it considers conspiratorial and generally
 7 averred the civil wrong to be fraud. Thus, Counterclaimant contends, “there is no requirement
 8 that Polo allege all the elements of the underlying tort (in this case, for fraud)...” Opposition at
 9 10:15-16. In fact, in Weinbaum, the Court explained the key to a conspiracy cause of action is
 10 the underlying tort, not merely the alleged conspiracy. Thus, it must be pled with sufficiency.

11 With the tort placed in context, we turn to the concept of conspiracy. In
 12 Applied Equipment Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal. 4th 503
 13 [28 Cal. Rptr. 2d 475, 869 P.2d 454], the Supreme Court explained that,
 14 “[s]tanding alone, a conspiracy does no harm and engenders no tort liability. It
 15 must be activated by the commission of an actual tort.” (*Id.* at p. 511.) This is
 16 so because a “bare agreement among two or more persons to harm a third
 17 person cannot injure the latter unless and until acts are actually performed
 18 pursuant to the agreement. Therefore, **it is the acts done and not the**
 19 **conspiracy to do them which should be regarded as the essence of the civil**
 20 **action.”**

21 (Emphasis added.)

22 In summary, Counterclaimant specifically concedes it did not meet the pleading
 23 requirements of Rule 9(b) because it believes pleading fraud with specificity is not required if
 24 the claim is coupled with a conspiracy-based claim. “Polo need not allege all the elements of
 25 fraud—only that there was a wrongful act with damage to Polo (by virtue of the conspiracy).”
 26

(Opposition at 10:13-14.) Consequently, Mr. Kiser respectfully requests the Court grant his motion to dismiss Counterclaimant's conspiracy to commit fraud cause of action.

III.

Conclusion

Justin Kiser respectfully requests the Court dismiss with prejudice Counterclaimant's cause of action for breach of fiduciary duty against him. As an hourly sales clerk in a clothing store, Mr. Kiser did not owe his employer a fiduciary duty. No amount of artful pleading or unsupported argument could establish such a claim against Mr. Kiser.

If the Court believes Counterclaimant might be capable of correcting its conspiracy to commit fraud cause of action, by following Rule 9(b)'s pleading requirements, then Mr. Kiser's motion to dismiss should be granted with leave to amend. Otherwise, the claim should be dismissed with prejudice.

Dated: October 24, 2007

THE LAW OFFICE OF PATRICK KITCHIN

_____/S/_____
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